Petition

81-1980

No.

Supreme Court, U.S.
FILED
APR 19 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1981

UNITED FRUIT AND VEGETABLE COMPANY, INC.,
Petitioner,

vs.

DIRECTOR OF THE FRUIT AND VEGETABLE DIVISION, MARKETING, Service, et. al
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law by the refusal of the Administrative Law Judge at trial before the United States Department of Agriculture to allow the Petitioner a stay of the proceedings so that he could obtain access to his own business records which had been previously seized by the F.B.I. in order to prepare a defense.

2. Whether said refusal resulted in the denial of the right to be heard in a meaningful manner in violation of the due process clause.

3. Whether said denial constitutes a denial of the right to present evidence in violation of the due process clause.

4. Whether this denial culminated in Petitioner being denied effective counsel in violation of the due process clause.

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*The Petitioner company has no affiliates or subsidiaries.

LIST OF ALL PARTIES

UNITED FRUIT AND VEGETABLE CO., INC.

DIRECTOR OF THE FRUIT AND VEGETABLE DIVISION

MARKETING SERVICE UNITED STATES DEPARTMENT OF AGRICULTURE AND

JOHN BLOCK, SECRETARY OF AGRICULTURE

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No.

In the Supreme Court of the United States

October Term, 1981

UNITED FRUIT AND VEGETABLE COMPANY, INC.,
Petitioner,

vs.

DIRECTOR OF THE FRUIT AND VEGETABLE DIVISION, MARKETING,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

United Fruit and Vegetable Company, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of United States Court of Appeals for the Eighth Circuit on January 21, 1982.

OPINIONS BELOW

The opinion of United States Court of Appeals for the Eighth Circuit is unreported and is printed in Appendix A hereto infra, pages A24-A27. The judgment of The Administrative Review Court of the Department of Agriculture is printed in Appendix A hereto, infra, pages A10-A23. The Journal Entry of Judgment of The Department of Agriculture Hearing is printed in Appendix A hereto, infra, pages A1-A9.

JURISDICTION

The judgment of United States Court of Appeals for the Eighth Circuit (Appendix A, infra, pages A24-A27), was entered on January 21, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

7 U.S.C. § 499(b)

> "(4) For any commission merchant, dealer, or broker to make, for a fraudlent purpose, any false or misleading statement in connection with any transaction involving any perishable agriculture commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction."

7 U.S.C. § 499(h)

> "(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section

499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender."

U.S. Const. Amend. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const. Amend. XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

A disciplinary proceeding was brought against the Petitioner, a corporation under the Perishable Agriculture Commodities Act 1930, as amended (7 U.S.C. § 499 et seq.

hereinafter the PACA). The Petitioner was charged with willful, flagrant and repeated violations of the PACA, a charge that in essence involved the daily running of Petitioner's business.

Prior to this hearing, on October 19, 1979 all of Petitioner's business records were seized by the Federal Bureau of Investigation (F.B.I.). These materials included business logs, accounting books inventory control books and several other pertinent documents. Despite urgent, repeated requests by the Petitioner for access to said records for purposes of providing a defense to the administrative charge, the records were not made available.

Trial proceeded on April 23, 1980 over the strenuous objection of Petitioner whose exculpatory evidence was beyond reach. The Petitioner's Motion for a Stay of Proceeding or a Dismissal was repeated throughout the hearing. Judgment against the Petitioner was rendered in December, 1980.

The Petitioner sought review of the decision and order of the Administrative Law Judge through an appeal to and review by Donald A. Campbell, Judicial Officer, Office of the Secretary of Agriculture. After review Judge Campbell upheld the lower administrative decision in an order entered April 3, 1981 revoking the Petitioner's license. This decision was appealed to the United States Court of Appeals for the Eighth Circuit. After both briefing and oral argument the administrative decision was upheld in an opinion dated January 21, 1982.

We seek review of the affirmance of the administrative decision to revoke the Petitioner's license and outright reversal of that decision.

REASONS FOR GRANTING THE WRIT

The Fifth and Fourteenth Amendments provide for the right to present evidence in one's own defense, the right to effective counsel and the right to be heard. These rights were denied Petitioner by the Administrative Law Judge Weber's decision to permit the trial to proceed when Petitioner did not have access to the very business records which would have formed the nexus of his defense. *Jenkins v. McKeithen*, 395 U.S. 411, 23 L.Ed. 2d 404, 89 S.Ct. 1843, rehearing denied 396 U.S. 869, 24 L.Ed. 2d 123, 90 S.Ct. 35 (1969); *Louisville and N.R. Co. v. Finn*, 235 U.S. 601, 59 L.Ed. 379, 35 S.Ct. 146.

The courts in interpreting the due process clause have determined that it is, "essentially the right to be heard". *Rumorce v. Board of Education*, 32 Ohio Misc. 165, 61 Ohio Ops. 2d 289, 290 N.W. 2d 195; 16A Am. Jur. 2d § 829. Quite clearly, by a categorical denial of the very materials which would have exculpated the Petitioner from the charges of nonpayment, the Petitioner has been denied due process of law.

Where the denial or restriction of a constitutional right is apparent this court has been disposed to grant review and to place a strict burden on those seeking to justify constitutional restriction. See *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946).

Undoubtedly, what is here presented to the Supreme Court for consideration under a Writ of Certiorari is the denial of a fundamental right protected under the Constitution. The Petitioner will be effectively prevented from pursuing his livelihood due to the Department of Agriculture's original decision to preclude him from reviewing his records in order to prepare a defense.

Without doubt many similar factual circumstances have arisen wherein the records of a Defendant are being withheld and he cannot properly answer charges levied at him. This is precisely the situation which demands a ruling by the Supreme Court that would set a consistent standard for the courts to follow.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

April 16, 1982

Appendix

APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. 2-5536

In re:

United Fruit and Vegetable Co., Inc.,
Respondent

DECISION AND ORDER

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, (7 USC 499a *et seq;* "PACA" or "Act") and related regulations (7 CFR 46.1 thru 46.45).

A Complaint was filed in January 1980 by the Director of the Fruit and Vegetable Division, Agricultural Marketing Service ("AMS"), United States Department of Agriculture ("USDA").

It alleged that Respondent United Fruit and Vegetable Co., Inc.,[1] violated section 2 of the PACA (7 USC 499b) when Respondent failed to make full payment promptly of the agreed purchase prices, or balances thereof, to 30

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1. Respondent's counsel states that Respondent's correct name is "United Fruit & Vegetable, Inc.," and does not include "Co." as pleaded in the Complaint.

However, Complainant's counsel states that the PACA license application shows the the name as pleaded in the Complaint.

sellers of 127 lots of commodities under the Act totaling approximately $750,159.40.

Respondent filed an Answer in which it denied any violations of the law or regulations.

Trial was held April 23 1980 in Kansas City, Missouri. Complainant was represented by Edward M. Silverstein, Esquire, Office of the General Counsel, United States Department of Agriculture. Respondent was represented by Gerald H. Rosen, Esquire and Gary F. Hoffman, Esquire, of Kansas City, Missouri, and Mr. Donald B. Steele of Morrison, Hecker, Curtis, Kuder & Parrish, of Kansas City, Missouri

At the opening of the hearing, Respondent's counsel filed a Motion to dismiss or stay the proceedings on the grounds that Respondent's records had been seized in October 1979 by the Federal Bureau of Investigation and the Kansas City Missouri police, and on the additional ground that the PACA license had already expired. The Motion was denied.

Following the trial, on May 5 1980, Respondent's counsel was invited to file an offer of proof (7 CFR 1.141(g)(7)) showing what Respondent expected to establish if the hearing was reopened. No response was filed.

I

Respondent is a Missouri corporation doing business in Kansas City, Missouri. It held a PACA license which was renewed annually until it expired April 12 1980 due to failure to pay the required annual fee.

From December 1978 through October 1979, Respondent received and accepted 127 lots of perishable agricultural commodities purchased from 30 sellers in interstate

commerce and failed to make full payment promptly of the agreed purchase prices, or balances thereof, totaling in the amount of approximately $750,159.40.[2]

On October 24 1979 Respondent filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11, United States Code, Bankruptcy, in the United States District Court for the Western District of Missouri (Docket No. 79-01399-1-11).

This constitutes wilful, flagrant and repeated violations of Section 2 of the PACA (7 USC 499b) and related regulations (7 CFR 46.2 (aa)(5)).

II

It is unlawful for "any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly . . . to the person with whom such transaction is had . . ." (7 USC 499b(4)).

The Secretary is authorized to ". . . publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for such a period not to exceed 90 days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender . . ." (7 USC 499h(a)).

The Secretary is also authorized to ". . . make such rules, regulations, and orders as may be necessary to carry out the provisions of this Chapter . . ." (7 USC 499o).

Pursuant thereto, the Secretary regulatorily provided that "full payment promptly" for the purpose of determin-

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2. Paragraph 5 of the Complaint itemizes the 127 transactions, showing the seller, the point of origin, the commodity and quantity, the date the shipment was accepted, the date payment became due under the regulatory requirements, and the agreed purchase price.

ing violations under the PACA means ". . . within 10 days after the day on which the produce is accepted . . ." 7 CFR 46.2 (aa), and (5).[3]

In order to impose a sanction for a violation of the statute and related regulations, the record must establish that violation with ". . . reliable, probative, and substantial evidence." (5 USC 556(d)).

When "wilfulness" is established in the record, the license may be suspended or revoked without pre-Complaint requirements. 5 USC 558c.

III

Here, Complainant has pleaded 127 transactions as the basis for its allegation that Respondent has violated the "prompt payment" provisions of the Act and related regulations. Complainant alleged the 127 transactions in itemized and detailed form.

Respondent in its Answer denied that it made "all of the purchases alleged", and denied "that payment was not made for any of said purchases", and denied that "the sum of $750,159.40 is due and owing for said purchases as alleged".

However, Respondent admitted that it "filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11, United States Code, Bankruptcy, in the United States District Court for the Western District of Missouri (No. 79-01399-1-11)." Paragraph 4 Respondent's Answer and paragraph 6 of the Complaint.

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3. See also 7 CFR 46.2 (aa)(9) which allows a contractually different time for payment to prevail, provided it is an "express agreement at the time the contract is made".

However, it also provides "[t]hat the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it."

Respondent denied that its actions constituted "wilful, flagrant and/or repeated violations of the PACA."

Respondent in its Answer stated: ". . . Respondent alleges that it is currently negotiating in its Chapter 11 Proceeding for the sale of all of its issued and outstanding stock to a California corporate purchaser whereby the Chapter 11 Proceeding would be dismissed and the creditors of the Respondent would be paid by the purchaser. This proposal has been submitted to the Creditor's Committee of Respondent for their review and approval. If such an agreement is approved and consummated, the creditors of Respondent will be paid, and there will be no further need for this proceeding to continue." Paragraph 7 of Respondent's Answer.

Complainant presented: (1) a copy of the Respondent's Voluntary Petition under Chapter 11; (2) a copy of the Bankruptcy Statement of all Debts of Debtor, Schedule A; (3) Respondent's work sheets which Respondent had prepared in contemplation of filing the Bankruptcy Petition; and (4) copies of documents (bills of lading and invoices) filed with USDA by sellers of fruits and vegetables in transactions alleged in the Complaint.[4]

The "Voluntary Petition" for Chapter 11 Bankruptcy Proceedings was supported by three different affidavits signed by John DeFeo, President of the Respondent corporate Petitioner. Mr. John DeFeo swore under oath for the Bankruptcy Court that the contents of the Petition and the creditor information was true and complete to

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4. These last documents were filed with USDA in connection with reparation proceedings against Respondent. 5 USC 499e *et seq.* and 7 CFR 47.6 thru 47.25.

the best of his knowledge and belief. Mr. John DeFeo was present in the courtroom throughout the trial.[5]

The Respondent's summary of creditors compiled to prepare the Bankruptcy Petition, the Bankruptcy Pleadings themselves, and the documents filed directly with USDA in connection with reparations complaints against Respondent, were correlated by Complainant. Complainant's Exhibit No. 5. The correlation shows little discrepancy between the figures which favors Respondent. If each discrepancy were resolved in the manner most favorable to Respondent, it would not significantly affect either the merits or the outcome.[6]

Consequently, the record clearly establishes at least a prima facie case for the violations as alleged in the Complaint.

Thus, the burden of proceeding with the evidence would call for Respondent to present evidence with sufficient probative value to offset some aspect(s) of the Complainant's prima facie case. However, Respondent chose not to call any witnesses, and to rely upon: (1) the unavailability of the business records, (2) the lack of quality of Complainant's proof, (3) the alleged failure to comply with Administrative Procedure Act requirements, and (4) legal argument.

Respondent tries to pretend that constitutional privileges which Mr. DeFeo used to explain his failure to testify, and the loss of records which were seized by Fed-

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5. Mr. DeFeo was represented as being desirous of testifying in the trial, but was "under such constitutional infirmity and disadvantage that he can't" testify. Hearing Transcript pages 131-132.

6. However, the record would not support resolving each of the discrepancies in favor of Respondent.

eral and State authorities, combined to block all opportunity Respondent had to defend itself. Respondent's counsel suggests that exculpating material *might* be available[7] to Respondent if those records were not being held by the police.

While those records may show exculpating or mitigating material as Respondent hopes, Respondent must present some evidence of some character to move that possibility out of the theoretical or hypothetical classification.

It must be recalled that these are Respondent's records from Respondent's business, not some third party. Their contents were made by Respondent's employees. Bookkeepers, cashiers, buyers who dealt with the sellers and may well have had discussions with the sellers concerning Respondent's outstanding debts over this period of time while new purchases were being discussed, could all testify as to any payments made to reduce the indebtedness.[8]

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7. Respondent in its brief at page 2 states that it "does not know whether the records seized by the FBI contain information which is exculpatory or in mitigation of the offenses [violations] which are alleged . . ." but argues that the "possibility" of such evidence being there is the threshold level for fatal procedural and constitutional due process error to emanate here. Respondent cites *Muller v FTC* 142 F2d 511 (CA6 1944) and *Salvino v US* 119 F Supp 277 (1954). Neither case is relevant here.

Muller in part held that failure to pursue available alternatives courses to resolve a problem eliminates error that might otherwise exist.

Here Respondent did *nothing* to show any basis for a factual defense. Respondent might have called bookkeepers, bank records or sellers to show any payments made.

Salvino is inapplicable for it involves changes occurring at a decisional level which Respondent was not able to address previously. This is not the situation here.

8. It is noted that purchases from some of the sellers were made regularly and periodically from December of 1978 through September of 1979. Thus, when the September 1979 purchases were made, there were unpaid outstanding debts over eight months old at that point. Thus, discussions between Respondent's buyers and the sellers concerning the indebtedness, and any payments that may have been made, would not be unusual.

Any payments made by Respondent to those vendors of any amount significant enough to affect the merits here should have been an easy matter of clear recollection for some of Respondent's employees.

Further, even if it were not desirable for Respondent's employees to testify concerning these matters, evidence of some payments could have been obtained from banking records or the sellers' records or employees.

It wouldn't even be necessary for the evidence to *establish* the payment made but merely to show some basis (beyond bare argument) to warrant a stay of the proceedings until the records were retrieved from governmental custody and control.[9]

It does not seem possible that payments could have been made to any of these sellers in any amount that would be exculpating or mitigating without someone at Respondent's business having some present recollection of it.

Respondent's argument that it could do nothing in the absence of the records is unpersuasive and unmeritorious.

Had Respondent presented some evidence of some character along this line, the issue would take on a different complexion. On this record, it is clearly without merit. There was no due process violation here.

Respondent also contends that the evidence against Respondent was not sufficient to prove the violations alleged. As discussed earlier, the sworn material submitted by Respondent's officers to the Bankruptcy Court, buttressed by other evidence made out a prima facie case. The burden of proceeding was on Respondent, and they

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9. Of course, Complainant's witnesses would have to have been recalled for further cross-examination as necessary.

refused and failed to present any evidence of any nature to rebut the prima facie case Complainant had made.

The evidence clearly establishes that the violations occurred as alleged, and that they were flagrant, repeated and wilful. The expiration of the license does not bar an administrative disciplinary action. The sanction sought is consistent with precedent. *In re Atlantic Produce Company, Inc.*, 35 AD 1631 (1976), *affirmed* in an unpublished *per curiam* opinion in the 4th Circuit (37 AD 97; 1978); *In re G. Steinberg and Son, Inc.*, 32 AD 236 (1973), *aff'd sub nom, George Steinberg and Son, Inc. v. Butz*, 491 F2d 988 (CA 2 1974) *cert den*, 419 US 830 (1974); *Zwick v. Freeman*, 373 F2d 110 (CA 2 1967) *cert den*, 389 US 835 (1967); *In re Rudolph John Kafcsak, d/b/a Acme Foods*, 39 AD ..... (J.O. Decision 5/15/80; Docket No. PACA 2-5307).

The request of Complainant should be granted.

ORDER

Respondent's license is revoked.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the rules of practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary within 30 days after service as provided in sections 1.139 and 1.145 of the rules of practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

Done this 15th day of December 1980
in Washington, D. C.
/s/ William J. Weber
William J. Weber
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. 2-5536

In re:

United Fruit and Vegetable Co., Inc.,
Respondent

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge William J. Weber filed an initial decision and order on December 15, 1980, revoking respondent's license for payment violations.

The respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).*

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*The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app., at 764 (1976). The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Respondent requests oral argument before the Judicial Officer, but since the issues have been thoroughly briefed and oral argument would not seem helpful, respondent's request for oral argument, which is discretionary (7 C.F.R. § 1.45(d)), is denied.

After careful consideration of the entire record in this proceeding, the initial decision and order is adopted as the final decision and order, with changes too minor to itemize. Additional conclusions by the Judicial Officer follow Judge Weber's conclusions.

ADMINISTRATIVE LAW JUDGE'S DECISION (AS MODIFIED)

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, (7 USC 499a *et seq;* "PACA" or "Act") and related regulations (7 CFR 46.1 thru 46.45).

A Complaint was filed in January 1980 by the Director of the Fruit and Vegetable Division, Agricultural Marketing Service ("AMS"), United States Department of Agriculture ("USDA").

It alleged that Respondent United Fruit and Vegetable Co., Inc.,[1] violated section 2 of the PACA (7 USC 499b) when Respondent failed to make full payment promptly of the agreed purchase prices, or balances thereof, to 30 sellers of 127 lots of commodities under the Act totaling approximately $750,159.40.

Respondent filed an Answer in which it denied any violations of the law or regulations.

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1. Respondent's counsel states that Respondent's correct name is "United Fruit & Vegetable, Inc.," and does not include "Co." as pleaded in the Complaint.

However, Complainant's counsel states that the PACA license application shows the name as pleaded in the Complaint.

Trial was held April 23 1980 in Kansas City, Missouri. Complainant was represented by Edward M. Silverstein, Esquire, Office of the General Counsel, United States Department of Agriculture. respondent was represented by Gerald H. Rosen, Esquire and Gary F. Hoffman, Esquire, of Kansas City, Missouri, and Mr. Donald B. Steele of Morrison, Hecker, Curtis, Kuder & Parrish, of Kansas City, Missouri.

At the opening of the hearing, Respondent's counsel filed a Motion to dismiss or stay the proceedings on the grounds that Respondent's records had been seized in October 1979 by the Federal Bureau of Investigation and the Kansas City Missouri police, and on the additional ground that the PACA license had already expired. The Motion was denied.

Following the trial, on May 5, 1980, Respondent's counsel was invited to file an offer of proof (7 CFR 1.141(g)(7)) showing what Respondent expected to establish if the hearing was reopened. No response was filed.

I

Respondent is a Missouri corporation doing business in Kansas City, Missouri. It held a PACA license which was renewed annually until it expired April 12 1980 due to failure to pay the required annual fee.

From December 1978 through October 1979, Respondent received and accepted 127 lots of perishable agricultural commodities purchased from 30 sellers in interstate commerce and failed to make full payment promptly of the agreed purchase prices, or balances thereof, totaling in the amount of approximately $750,159.40.[2]

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2. Paragraph 5 of the Complaint itemizes the 127 transactions, showing the seller, the point of origin, the commodity and quantity, the date the shipment was accepted, the date payment became due under the regulatory requirements, and the agreed purchase price.

On October 24 1979 Respondent filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11, United States Code, Bankruptcy, in the United States District Court for the Western District of Missouri (Docket No. 79-01399-1-11).

This (*i.e.*, Respondent's failure to make full payment promptly) constitutes wilful, flagrant and repeated violations of Section 2 of the PACA (7 USC 499b) and related regulations (7 CFR 46.2 (aa) (5)).

II

It is unlawful for "any commission merchant, dealer, or broker . . . to fail or refuse truly and correctly to account and make full payment promptly . . . to the person with whom such transaction is had . . ." (7 USC 499b(4)).

The Secretary is authorized to ". . . publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for such a period not to exceed 90 days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender . . ." (7 USC 499h(a)).

The Secretary is also authorized to ". . . make such rules, regulations, and orders as may be necessary to carry out the provisions of this Chapter . . ." (7 USC 499o).

Pursuant thereto, the Secretary regulatorily provided that "full payment promptly" for the purpose of determining violations under the PACA means ". . . within 10 days after the day on which the produce is accepted. . ." 7 CFR 46.2 (aa), and (5).[3]

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3. See also 7 CFR 46.2 (aa) (9) which allows a contractually different time for payment to prevail, provided it is an "express agreement at the time the contract is made".

However, it also provides "[t]hat the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it."

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III

Here, Complainant has pleaded 127 transactions as the basis for its allegation that Respondent has violated the "prompt payment" provisions of the Act and related regulations. Complainant alleged the 127 transactions in itemized and detailed form.

Respondent in its Answer denied that it made "all of the purchases alleged", and denied "that payment was not made for any of said purchases", and denied that "the sum of $750,159.40 is due and owing for said purchases as alleged".

However, Respondent admitted that it "filed a voluntary petition for reorganization pursuant to Chapter 11 of Title 11, United States Code, Bankruptcy, in the United States District Court for the Western District of Missouri (No. 79-01399-1-11)." Paragraph 4 Respondent's Answer and paragraph 6 of the Complaint.

Respondent denied that its actions constituted "wilful, flagrant and/or repeated violations of the PACA."

Respondent in its Answer stated: ". . . Respondent alleges that it is currently negotiating in its Chapter 11 Proceeding for the sale of all of its issued and outstanding stock to a California corporate purchaser whereby the Chapter 11 Proceeding would be dismissed and the cred-

itors of the Respondent would be paid by the purchaser. This proposal has been submitted to the Creditor's Committee of Respondent for their review and approval. If such an agreement is approved and consummated, the creditors of Respondent will be paid, and there will be no further need for this proceeding to continue." Paragraph 7 of Respondent's Answer.

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The "Voluntary Petition" for Chapter 11 Bankruptcy Proceedings was supported by three different affidavits signed by John DeFeo, President of the Respondent corporate Petitioner. Mr. John DeFeo swore under oath for the Bankruptcy Court that the contents of the Petition and the creditor information was true and complete to the best of his knowledge and belief. Mr. John DeFeo was present in the courtroom throughout the trial.[5]

The Respondent's summary of creditors compiled to prepare the Bankruptcy Petition, the Bankruptcy Pleadings themselves, and the documents filed directly with USDA in connection with reparations complaints against Respondent, were correlated by Complainant. Complain-

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4. These last documents were filed with USDA in connection with reparation proceedings against Respondent. 5 USC 499e *et seq.* and 7 CFR 47.6 thru 47.25.

5. Mr. DeFeo was represented as being desirous of testifying in the trial, but was "under such constitutional infirmity and disadvantage that he can't" testify. Hearing Transcript pages 131-132.

ant's Exhibit No. 5. The correlation shows little discrepancy between the figures which favors Respondent. If each discrepancy were resolved in the manner most favorable to Respondent, it would not significantly affect either the merits or the outcome.[6]

Consequently, the record clearly establishes at least a prima facie case for the violations as alleged in the Complaint.

Thus, the burden of proceeding with the evidence would call for Respondent to present evidence with sufficient probative value to offset some aspect(s) of the Complainant's prima facie case. However, Respondents chose not to call any witnesses, and to rely upon: (1) the unavailability of the business records, (2) the lack of quality of Complainant's proof, (3) the alleged failure to comply with Administrative Procedure Act requirements, and (4) legal argument.

Respondent tries to pretend that constitutional privileges which Mr. DeFeo used to explain his failure to testify, and the loss of records which were seized by Federal and State authorities, combined to block all opportunity Respondent had to defend itself. Respondent's counsel suggests that exculpating material *might* be available[7] to Respondent if those records were not being held by the police.

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6. However, the record would not support resolving each of the discrepancies in favor of Respondent.

7. Respondent in its brief at page 2 states that it "does not know whether the records seized by the FBI contain information which is exculpatory or in mitigation of the offenses [violations] which are alleged . . ." but argues that the "possibility" of such evidence being there is the threshold level for fatal procedural and constitutional due process error to emanate here. Respondent cites *Muller v FTC* 142 F2d 511 (CA6 1944) and *Salvino v US* 119 F Supp 277 (1954). Neither case is relevant here.

(Continued on following page)

While those records may show exculpating or mitigating material as Respondent hopes, Respondent must present some evidence of some character to move that possibility out of the theoretical or hypothetical classification.

It must be recalled that these are Respondent's records from Respondent's business, not some third party. Their contents were made by Respondent's employees. Bookkeepers, cashiers, buyers who dealt with the sellers and may well have had discussions with the sellers concerning Respondent's outstanding debts over this period of time while new purchases were being discussed, could all testify as to any payments made to reduce the indebtedness.[8]

Any payments made by Respondent to those vendors of any amount significant enough to affect the merits here should have been an easy matter of clear recollection for some of Respondent's employees.

Further, even if it were not desirable for Respondent's employees to testify concerning these matters, evidence of some payments could have been obtained from banking records or the sellers' records or employees.

Footnote continued—

Muller in part held that failure to pursue available alternative courses to resolve a problem eliminates error that might otherwise exist.

Here Respondent did *nothing* to show any basis for a factual defense. Respondent might have called bookkeepers, bank records or sellers to show any payments made.

Salvino is inapplicable for it involves changes occurring at a decisional level which Respondent was not able to address previously. This is not the situation here.

8. It is noted that purchases from some of the sellers were made regularly and periodically from December of 1978 through September of 1979. Thus, when the September 1979 purchases were made, there were unpaid outstanding debts over eight months old at that point. Thus, discussions between Respondent's buyers and the sellers concerning the indebtedness, and any payments that may have been made, would not be unusual.

It wouldn't even be necessary for the evidence to *establish* the payment made but merely to show some basis (beyond bare argument) to warrant a stay of the proceedings until the records were retrieved from governmental custody and control.[9]

It does not seem possible that payments could have been made to any of these sellers in any amount that would be exculpating or mitigating without someone at Respondent's business having some present recollection of it.

Respondent's argument that it could do nothing in the absence of the records is unpersuasive and unmeritorious.

Had Respondent presented some evidence of some character along this line, the issue would take on a different complexion. On this record, it is clearly without merit. There was no due process violation here.

Respondent also contends that the evidence against Respondent was not sufficient to prove the violations alleged. As discussed earlier, the sworn material submitted by Respondent's officers to the Bankruptcy Court, buttressed by other evidence made out a prima facie case. The burden of proceeding was on Respondent, and they refused and failed to present any evidence of any nature to rebut the prima facie case Complainant had made.

The evidence clearly establishes that the violations occurred as alleged, and that they were flagrant, repeated and wilful. The expiration of the license does not bar an administrative disciplinary action. The sanction sought is consistent with precedent. *In re Atlantic Produce Company, Inc.*, 35 AD 1631 (1976), *affirmed* in an unpublished

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9. Of course, Complainant's witnesses would have to have been recalled for further cross-examination as necessary.

per curiam opinion in the 4th Circuit (37 AD 97; 1978); *cert denied*, 439 US 819 (1978); *In re G. Steinberg and Son, Inc.*, 32 AD 236 (1973), *aff'd sub nom, George Steinberg and Son, Inc. v. Butz*, 491 F2d 988 (CA 2 1974) *cert den*, 419 US 830 (1974); *Zwick v Freeman*, 373 F2d 110 (CA 2 1967) *cert den*, 389 US 835 (1967); *In re Rudolph John Kafcsak, d/b/a Acme Foods*, 39 AD [683] (J.O. Decision 5/15/80; Docket No. PACA 2-5307), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980).

The request of Complainant should be granted.

ADDITIONAL CONCLUSIONS BY JUDICIAL OFFICER

Failure to pay in full for produce is regarded as a very serious violation of the Perishable Agricultural Commodities Act, and in recent years it has been the consistent practice of the Judicial Officer to revoke the license of the offender in failure to pay cases[10] since it is the "goal [of the Perishable Agricultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricultural commodities industry."[11]

A suspension or revocation order can be issued notwithstanding the termination of the license prior to the issuance of the order.[12]

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10. *E.g., In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414-16 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 811-12 (1978); *In re Solt*, 35 Agric. Dec. 721, 723, 726 (1976); *In re Catanzaro*, 35 Agric. Dec. 26, 30-36 (1976), *aff'd.*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *accord, In re Kafcsak*, 39 Agric. Dec. 683, 686-87 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980).

11. *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); *accord, Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

12. *In re M&H Produce Co.*, 34 Agric. Dec. 700, 750 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 138-40,

(Continued on following page)

If a violator who fails to pay does not have a license in effect, a decision may be issued finding that the person has engaged in a repeated or flagrant violation of the Act,[13] which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation.[14]

Footnote continued—

aff'd. per curiam, 524 F.2d 977 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 250-53 (1973), *aff'd.*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord*, *In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976), *aff'd. mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); and *see Quinn v. Butz*, 510 F.2d 743, 749-50 (D.C. Cir. 1973). The legislative history of the Act suggests that suspension or revocation orders cannot be issued as to nonactive licenses, H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 750, 87th Cong., 1st Sess. 7 (1961); S. Rep. No. 554, 73d Cong., 2d Sess. 2 (1934); H.R. Rep. No. 489, 73d Cong., 2d Sess. 2 (1934); and *see Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1258 (5th Cir. 1975), but the matter is of no practical consequence, at least as far as revocation is concerned, since a finding that a violation was flagrant or repeated has the same effect as a revocation order (see notes 13, 14, and related text). However, if a suspension order could not be issued as to a nonactive license, the much more severe order finding that a violation was flagrant or repeated would have to be issued, where appropriate. The suspension of a terminated license was upheld, without discussing the authority to take such action, in *Mandell, Spector, Rudolph Co. v. United States*, 364 F.2d 889, 893-94 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

13. *E.g.*, *In re Kafcsak*, 39 Agric. Dec. 683, 686-87 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-21 (1978); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 694-96 (1977); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd. mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1885-89 (1975); *In re M&H Produce Co.*, 34 Agric. Dec. 700, 748-52 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1896-1914 (1974), *aff'd.*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 253, 266-70 (1973), *aff'd.*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

14. *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M&H Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

Respondent's contention that it was prejudiced in this case because its records were seized is without merit because, *inter alia*, even if respondent could show that it had paid in full for 95% of the produce involved in the alleged violations, the remaining 5% would still constitute repeated and flagrant violations.

It has been held that a "finding of 'repeated' violations is appropriate wherever there is more than one violation of the Act."[15] A number of violations are "repeated" even though they occur during one short period of time resulting from a single financial setback[16] or they may be lumped into one or two categories.[17]

A violation is "flagrant," *inter alia*, if it involves a substantial sum of money[18] or it results from a licensee entering into transactions knowing that its financial condition is such as to make violations likely.[19]

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15. *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd. mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978).

16. *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *accord*, *In re M&H Produce Co.*, 34 Agric. Dec. 700, 748 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

17. *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 n 6 (3d Cir. 1960).

18. *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) ($19,000); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) ($48,000); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) ($108,519), *aff'd.*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re M&H Produce Co.*, 34 Agric. Dec. 700, 747 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

19. *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1973), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978); *In re M&H Produce Co.*, 34 Agric. Dec. 700, 747 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

It would not be a mitigating circumstance to explain unexpected events that contributed to respondent's inability to make full payment. Many excuses are offered in failure to pay cases as to why payment could not be made, *e.g.*, bankruptcy, another firm failed to pay the violator for produce, or an unusual situation occurred such as a strike or fire, but all such excuses are routinely rejected in determining whether a violation occurred or whether the violation was wilful[20] since "the Act calls for payment—not excuses."[21] The reasons why such excuses are rejected, and why they are not regarded as mitigating circumstances under the Perishable Agricultural Commodities Act regulatory program even though they might be regarded as mitigating circumstances under a different type of regulatory program, are explained in *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979).

Furthermore, even if respondent's creditors were to accept respondent's partial payment of the purchase price in full satisfaction of the debts, that would not constitute

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20. A violation is wilful if the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

21. *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976), *aff'd.*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973), *aff'd.*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord, In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976), *aff'd. mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944).

full payment, and would not negate a violation of the Act.[22]

In the circumstances, respondent's license should be revoked.[23]

Order

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 20th day after service thereof on the respondent.

Done at Washington, D.C.
April 3, 1981
/s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer
Office of the Secretary

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22. *In re Kafcsak*, 39 Agric. Dec. 683, 685 (1980), *appeal docketed*, No. 80-3406 (6th Cir. June 26, 1980); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1639-40 (1976), *aff'd. mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M&H Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd. mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd.*, 524 F.2d 1255, 1258 (5th Cir. 1975).

23. If a reviewing court were to hold that a license which was active when the violations occurred, but which became inactive prior to the issuance of the order, cannot be revoked (see note 12), and if the court were to set aside that portion of the order issued in this case revoking respondent's license, the court's action would have no effect on respondent or persons responsibly connected with respondent. Without any further action by the Judicial Officer, the remaining portions of this decision and order would subject respondent and persons responsibly connected with respondent to the same sanctions as if the revocation order were sustained, see notes 13, 14, and related text.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1554

United Fruit and Vegetable Co., Inc.,
Petitioner,

v.

Director of the Fruit & Vegetable Division, Marketing Service United States Department of Agriculture, and John Block, Secy of Agriculture,
Respondents.

Appeal from Order of United States Department of Agriculture

Submitted: January 15, 1982
Filed: January 21, 1982

Before BRIGHT, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

United Fruit and Vegetable Co., Inc. (United Fruit) appeals the United States Department of Agriculture's revocation of its license to sell and deal in perishable agricultural products. United Fruit claims the decision was erroneous because the company was denied due process in its hearing before the agency and because the agency's findings had not been proven by substantial evidence. We affirm the Secretary of Agriculture's findings and revocation of United Fruit's license.

On October 24, 1979, United Fruit filed a voluntary petition in bankruptcy pursuant to chapter XI, Title XI of the United States Code. The company listed as part of its indebtedness $750,000 arising from 127 lots of unpaid produce.

The Fruit and Vegetable Division of the Department of Agriculture initiated this action upon learning that United Fruit had failed to pay various sellers for these 127 lots of produce during the period from December 1978 through October 1979. The agency sought revocation of United Fruit's license to sell and deal in perishable agricultural products because of willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499b(4); 499h(b)(2) (PACA). In substance, these sections require that all dealers or brokers involved in the trading of produce in interstate commerce pay "fully and promptly" for all produce purchases.

Even though United Fruit did not seek renewal of its license, it answered the charges stating that it denied "that it made all of the purchases alleged in [the complaint]" and denied "that payment was not made for any of the said purchases as alleged in the [complaint]."

A hearing was held on April 23, 1980, before an administrative law judge (ALJ). The Department of Agriculture adduced evidence consisting of United Fruit's Schedule A from its bankruptcy petition, invoices from unpaid sellers, and testimony from various agency specialists which showed that United Fruit failed to pay fully and promptly for 127 lots of produce involving a total default of more than $750,000 to thirty individual sellers in four states. United Fruit did not present evidence. However, it claimed it could not present a defense until its books and records were released from the custody of the Federal

Bureau of Investigation. The FBI and the Kansas City Police Department had seized the items as part of an investigation of the company's activities.

United Fruit did not provide the court with an offer of proof as to what the records would establish, except to state that the records might show that the company had entered into compromises with the sellers.[1] United Fruit requested a continuance; however, the ALJ questioned the need for it. The ALJ requested that United Fruit make an offer of proof as to what the records would show. United Fruit failed to respond to the ALJ's request.

The ALJ issued his decision on December 15, 1980, revoking United Fruit's license. United Fruit appealed and on April 3, 1981, a judicial officer of the Department of Agriculture affirmed the ALJ's decision. The final agency decision noted that United Fruit had failed to show the relevance of the seized records and that it had been incumbent on United Fruit to "present some evidence of some character to move [the question of relevance] out of the theoretical or hypothetical category."

United Fruit appeals the decision on the grounds that it was denied due process because the ALJ denied its request for a continuance. United Fruit also appeals claiming the agency's decision is not sustained by substantial evidence.

We cannot say that the ALJ's denial of the continuance request constituted an abuse of discretion. United Fruit did not show that any purpose would have been

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1. Such compromises would not have changed the fact that United Fruit had, on numerous occasions, failed to pay in full for perishables that had been ordered and delivered. Thus, there were still violations of 7 U.S.C. § 499b(4) which makes it unlawful "to fail or refuse truly and correctly to account and make full payment promptly * * *."

served by a continuance. *See* n.1 *supra*. It had two opportunities to make such a showing: at the hearing before the ALJ and at a later date when the ALJ invited it to submit an offer of proof. However, United Fruit made no attempt to take advantage of these opportunities and made no attempt to show the relevance of the seized records. Furthermore, United Fruit had access to the books and records in the FBI's possession, so it could have obtained the information it claimed it needed. This, along with the alternative sources of information available to United Fruit, renders unconvincing United Fruit's argument that it was denied due process.

After reviewing the evidence, we hold the agency's decision is sustained by substantial evidence. The admissions made in United Fruit's bankruptcy petition recognized the debts which are the subject of this action. The agency also produced invoices from the unpaid sellers and testimony from various agency experts and investigators. On the other hand, United Fruit produced no evidence. In light of these facts, there was substantial evidence proving "repeated" and "flagrant" violations of PACA. *See Reese Sales Co. v. Hardin*, 458 F.2d 183 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

For the reasons stated above, we affirm the agency's ruling.

Affirmed.

A true copy.

Attest: /s/ Robert D. St. Visen

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.